IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 173 of 1992

with

SPECIAL CIVIL APPLICATION No 174 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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GORDHANBHAI N VAGHELA

Versus

MARUTI CO-OP HOUSING SOCEITY

Appearance:

1. Special Civil Application No. 173 of 1992
   MR BS SUPEHIA for Petitioner No. 1
   MR BHARAT T RAO for Respondent No. 1
   NOTICE SERVED for Respondent No. 2
   ..... for Respondent No. 3-4
2. Special Civil Application No. 174 of 1992
   MR BS SUPEHIA for Petitioner No. 1
   MR BHARAT T RAO for Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 01/08/2002

ORAL JUDGEMENT

1. Since in both these petitions the facts are common and rather inter-connected, they are being dealt with together.

2. The common facts are that one Smt.Pallaviben and one Shri Shirishbhai were the members of Maruti Cooperative Housing Society Limited (hereinafter referred to as "respondent society). It is the case of the petitioner that the said Pallaviben and Shirishbhai (hereinafter referred to as "original members") had executed a power of attorney in favour of one Smt.Maltiben, who was looking after the affairs of Pallaviben, since Pallaviben, as per the contention of the petitioners, is residing in the USA. The original members were allotted Plot No.6 with tenement by the society in capacity as the members of the society. The said Maltiben, who in her capacity of power of attorney holder of the original members had initially entered into an agreement somewhere in the month of January, 1988 with one Dayaljibhai N. Vaghela. However, the other members of the Society and the office-bearers were not happy with the said agreement to sell and it is the contention of the petitioners that upon the requirements of the society, on 23-1-1988 a letter was submitted in writing by Maltiben and the said Dayalji N. Vaghela that the sale-agreement for purchase of the land shall be cancelled. It is the case of the petitioners that on the basis of the said letter dated 23-1-1988, the matter was considered by the General Body of the Society and the meeting of the General Body was adjourned so as to enable Maltiben to produce the cancellation deed. It is the case of the petitioners that on 4-2-1988, the Society had given a letter to Maltiben that they have no objection if the Plot No.6 is sold by the Original Members to Shri Gordhanbhai Naranbhai Vaghela who is the petitioner herein. It is the further case of the petitioners that on the basis of the said letter dated 4-2-1988 issued by the Society, the said Maltiben, on behalf of the Original Members, made the payment of all outstanding amount and also membership fees for the purpose of transferring the share in the name of the petitioners and the said payment was made as per the forwarding letter dated 7-2-1988 by cheque. However, nothing happened thereafter and, therefore, the petitioners addressed a letter dated 19-8-1988 to the District Registrar, Cooperative

Societies, pointing out that upon the no-objection certificate, the plot is sold and the share is to be transferred. However, the Society has not taken any steps and, therefore, appropriate action may be taken against the Society under the Section 24 of the Gujarat State Cooperative Societies Act read with Rule 12(2) of the Gujarat State Cooperative Rules (hereinafter referred to as "the Act" and "the Rules" respectively). It appears that the District Registrar, ultimately after hearing the petitioner as well as the society passed the order on 4-2-1989, whereby in purported exercise of the power under Section 24 of the Act read with Rule 12(2) of the Rules, he ordered the society to admit the petitioners as the members. The society carried the matter before the Additional Registrar (Appeals) by preferring a revision application No.16/1989 and it was contended on behalf of the Society that the letter on the basis of which the case is pleaded for admission is concocted and it was also submitted that Section 24 of the Act is declared ultra virus as per the decision of this Court in the case of "Amreli District Cooperative Sale and Purchase Union Ltd. and Ors. v. State of Gujarat", reported in 25(2) GLR, 1244 and, therefore, the order of the District Registrar is illegal. The aforesaid both contentions were accepted by the Additional Registrar and the order dated 10-3-1989 was passed, whereby the revision was allowed and the order of the District Registrar was set aside. The matter was also carried by the petitioners before the State Government by preferring a revision under Section 155 of the Act. However, the State Government, while up-holding the decision of the Additional Registrar, further added that since the lavad suit No.866/1988 is pending before the Board of Nominees, the suit may be expedited and the revision was ultimately dismissed. The aforesaid orders of the Additional Registrar as well as of the State Government dated 10-3-1989 and 29-3-1989 respectively are the subject matter of SCA No.173/1991.

3. It has been reported at the Bar that the said lavad suit No.866/1988 is dismissed by the learned Nominee as per the judgement and the award dated 31-3-1999 and against the same appeal is preferred before the Gujarat State Cooperative Tribunal and the learned Tribunal has granted stay in the said matter. It is also submitted on behalf of the petitioner as well as the respondents that the aforesaid lavad suit No.866/1988 has been simultaneously heard and disposed of with the lavad suit No.531 of 1988 and No.168/1989, which were preferred by the society against the petitioners for prohibiting the construction and for further prohibiting the entry

over the plot respectively. The appeal is also preferred against the judgement and award in the aforesaid two suits and the matter is pending before the Gujarat State Cooperative Tribunal and a statement is made at the Bar that the status-quo is ordered to be maintained and the matter is at that stage.

4. So far as the SCA No.174/1992 is concerned the facts are that pending the aforesaid litigation of SCA, which is the subject matter of No.173/1992, the society is initiated the proceedings for expelling the original members under Section 36 of the Act. It is the case of the Society that a notice was issued under Section 36(1) of the Act to the original members at the USA by registered post and the original members have not remained present and the matter was considered at the General Body meeting on 23-12-1990, which came to be held as per the agenda dated 21-11-1990. The case of the Society is that since the original members did not avail of the opportunity the matter was considered by the General Body and the resolution was passed for expelling the original members as the members of the society. The said resolution dated 23-12-1990 passed by the general body of the society was forwarded to the District Registrar for approval and the District Registrar ultimately passed the order on 8-4-1991, whereby the approval is granted. It has been recorded in the order of the district Registrar that the notices were served to the opponents namely, Maltiben, who has been described as the power of attorney holder of Pallaviben and Shirishbhai, however, they have not remained present or have not made any submission, but Mr.Gordhanbhai N. Vaghela has remained present and has requested for time. It appears that Maltiben, who is the power of attorney holder of the Original members carried the matter before the Additional Registrar (Appeal) by preferring Revision Application No.32/1991 and contended that there was a joint membership and the power of attorney was held by Maltiben and there is no proof produced before the office of the District Registrar. In any case, the society was aware regarding power of attorney held by Maltiben but no notice is served upon Maltiben and, therefore, proper procedure is not followed. The Additional Registrar ultimately allowed the revision mainly on the ground that if the person is expelled as a member of the society, it will adversely affect the right to have the property over the plot and since it is a serious action even if it is assumed that the notice was given and no opportunity of hearing has been given and, therefore, the approval granted by the District Registrar was set aside and it was further directed that a proper opportunity may be

given to Pallaviben and Shirishbhai to remain present in the general body meeting and opportunity of hearing may be given and the proceedings may be undertaken further. The society has further carried the matter before the State Government by preferring revision under Section 155 of the Act and the State Government proceeded on the basis that when the agenda dated 21-11-1990 is issued, it is deemed that it must have been received by all the members and, therefore, if the conduct of the member is such that he does not avail of the opportunity no default can be found with the resolution of the society and, therefore, ultimately the State Government has allowed the revision and the order of the District Registrar of granting approval is maintained. The said order of the State Government dated 3-12-1991 is the subject matter of SCA No.174 of 1992.

5. Mr.B.S.Supehia, learned Counsel appearing on behalf of the petitioners in both these petitions, has submitted that the right to refuse the membership is not an absolute right of the society and he submitted that even if Section 24 of the Act is declared ultra virus, the society is bound to comply with the requirements of Rule 12(2) of the Rules. He submitted that when the District Registrar found that there is no proper compliance, the order of the District Registrar directing the petitioners to be admitted as the members of the society was valid and the same should not have been set aside by the Additional Registrar in appeal. He relied upon the judgement of this Court in the case "Jain Merchants Co-op. Housing Society Ltd. & Ors. v. H.U.F. of Manubhai Kalyanbhai Shah through its Manager Harishbhai Manubhai Shah & Ors.", reported in 1995(1) GLR, 19 to contend that the Division Bench of this Court, after considering the "Amreli District Co-operative Sale and Purchase Union Ltd.'s case(Supra)" has negatived the contention raised regarding the validity of the Rule 12(2) of the Rules. He submitted that when the validity of Rule 12(2) of the Rules is upheld by the Division Bench of this Court, the Society could not have refused admission to the petitioners. He also relied upon the judgement of this Court in the case of "Zoroastrian Co-operative Housing Society Ltd. & Anr. v. District Registrar, Co-op. Societies (Urban) & Ors.", reported in 1997(1) GLR, 602 to contend that the Society is bound to comply with the provisions of Rule 12(2) of the Rules and there is no absolute right for the Society to refuse the membership. Mr.Supehia also submitted that even if it is assumed that there are powers under Section 36 of the Act for expelling a person as a member, but such powers are required to be exercised with more care and caution,

particularly in housing cooperative societies when the rights of the member concerned is to be vitally affected or rather adversely affected on account of decision of expelling such person as the member. Mr.Supehia has submitted that in any case when the Additional Registrar had found that the matter deserved to be remanded, the State Government could not have interfered with the order passed by the Additional Registrar (Appeal) so far as it relates to the decision of expulsion and its approval is concerned.

6. On behalf of the respondent Society, Mr.B.T.Rao, the learned Counsel, while supporting the order of the lower authority, more particularly of the State Government, has submitted that the no-objection letter on the basis of which reliance was placed for the purpose of getting the admission as member of the Society is itself concocted. Mr.Rao also submitted that when Section 24 is declared ultra virus and other members of the society found that the conduct of the petitioners is such that he is abusing the other members and certain office-bearers are also physically beaten, the society has rightly refused the membership. Mr.Rao also submitted that the opportunity was given before taking decision for expulsion and if the person has not availed of the opportunity, it cannot be said that there is any breach committed by the Society for the purpose of taking decision of expulsion. He submitted that this Court, while exercising the power under Article 226 of the Constitution of India, will not normally interfere with the decision of the lower authority, unless the finding is perverse to the record of the case. The learned Counsel contended that since the authority has, while exercising revisional powers in both the matters, properly exercised discretion, no interference is called for. Mr.Rao also submitted that though the appeal is pending against the decision of the Nominee in the lavad suit, the fact remains that suits are decided against the petitioners and, therefore, it shows that the conduct of the petitioners is such that they are not entitled to invoke the equitable jurisdiction of this Court under Article 226 or 227 of the Constitution of India.

7. Mr.H.C.Patel, learned AGP on behalf of the respondent authority, has supported the order passed by the State Government. However, he has submitted that since the irregularities were committed by the office-bearers of the Society, as per his instruction, the Committee is superseded and the Administrator is appointed on 1-9-2000, and it appears that the Administrator is holding the charge of the affairs of the

Society since then.

8. In view of the above facts and circumstances of the case, the matter which requires first consideration is regarding the expulsion of a member from a housing cooperative society. Section 36 of the Act reads as under:

> "36. Expulsion of members. - (1) A society may, by resolution passed by three-fourths majority of all the members present and voting at a general meeting of members held for the purpose, expel a member for acts which are detrimental to the proper working of the society:
>
> Provided that, no resolution shall be valid, unless the member concerned is given an opportunity of representing his case to the general body, and no resolution shall be effective unless it is submitted to the Registrar for his approval and approved by him:
>
> Provided further that, the approval or disapproval of the Registrar shall be communicated to the society within a period of three months from the date of such submission, and in the absence of such communication the resolution-shall be effective.
>
> (2) No member of a society who has been expelled under sub-section (1) shall be eligible for re-admission as a member of that society, or for admission as a member of any other society, for a period two years from the date of such expulsion:
>
> Provided that, the Registrar may, in special circumstances, sanction the re-admission or admission, within, the said period, of any such member as a member of the said society or of any as the case may be."

9. It is true that Section 36 applies to all cooperative societies irrespective of the fact that whether the same is housing cooperative society or otherwise. However, it is apparent that expelling a person as the member is more serious action in comparison to admitting a person as the member in a society. Further, if Section 36(2) of the Act is kept in mind, once a person is expelled as the member, he is debarred from becoming member in any other cooperative society for

a period of two years. Therefore, there is no manner of doubt in arriving at the conclusion that action under Section 36 of the Act of expelling any person as a member of the Society is a serious action, which is rather a stigmatic action to be attached to that member who is sought to be expelled. Further in a housing cooperative society, after a person becomes member, a plot or a flat or a tenement is being allotted to him in his capacity as a member and may be that as against the allotment the person concerned when admitted as a member would be required to make payment to the society. However, the allotment of the plot/flat/tenement to a member in a housing cooperative society is a valuable right and, therefore, right to property, even transfer of property and some interest, is created in the property namely, the plot/flat/tenement as the case may be on account of such allotment in capacity as member of the society. It may be that technically the society is the owner of the said portion which is allotted to the member, but it cannot be said that the person has no valuable interest in the property. When the membership right of a person is coupled with the interest over the property which is allotted to him, his expulsion as a member becomes more serious action. Not only that, it is also a known fact that a plot or flat or tenement, which is allotted by the society to a member concerned is like a shelter of the family of the member concerned possibly after investment of life savings and, therefore, the power under Section 36 of the Act, which may be exercised against the member by the society cannot be lightly considered as consequently it results into deprivation of the property allotted to such member.

10. In view of the earlier discussion, I am of the view that in the matter of exercising the power under Section 36 of the Act in a housing cooperative society, the principles of natural justice must be extended to a larger extent with its fullest scope, so that before a person is expelled as a member and the property which is under his possession is taken back by the society, he must be given full opportunity of putting forward his case to the general body of the society. In any case, the society who takes the decision must consider all the aspects which are put forward by the member, including the facts and circumstances of the personal convenience/inconvenience and also rather an important fact that a shelter is to be lost by the member concerned when he is expelled as a member of the society in a housing cooperative society by the housing cooperative society. It should also be considered as to whether any other lesser action of imposing penalty or of recovering

special cost etc. are possible or not. It appears that power under Section 36 for expulsion can be taken to only as a last resort in a housing coop. society. Therefore, on true consideration of Section 36 of the Act, I am of the view that the principles of natural justice must be applied with its wide aptitude and scope, when the housing cooperative society has to exercise the power of expelling any person concerned as member. It is made clear that it is on account of the particular facts and circumstances in a matter of membership of housing cooperative society I am inclined to take such view.

11. In view of the aforesaid yardsticks and criteria, the Additional Registrar had rightly found that even if the notice is issued, since the opportunity of hearing is not given, the decision of granting approval deserves to be set aside on the said ground alone. Further more, the aforesaid is with situation namely, that there is a joint membership and together with Pallaviben, Shirishbhai is also a joint member. It is not the case of the society that any notice was served to Shri Shirishbhai. Moreover, it was within the knowledge of the society that Maltiben, who is holding the power of attorney and who is looking after the affairs of Shirishbhai, is not served with the notice. There is no cogent material on record produced by the society to show that the agenda was duly served upon the original members namely, Pallaviben and Shri Shirishbhai both, or Maltiben on behalf of the original members. In that view of the matter, I am of the view that the Additional Registrar, while passing the order on 29-6-1991, had rightly allowed the revision by setting aside the order of District Registrar of granting approval. The aforesaid aspects are not at all properly taken into consideration by the State Government, while passing the order dated 3-12-1991 and the State Government passed the order on the basis of the surmises and conjectures, namely that it is deemed that the agenda must have been served etc. However, at the same time, the fact remains that the opportunity was given to the petitioners by way of show-cause notice and the petitioners have not availed of such opportunity. Since the petitioners did not availed of the opportunity, the society proceeded to pass the resolution and ultimately the litigation has reached to the stage of the present petition. Mr.Supehia has fairly submitted that the petitioners would be agreeable for a reasonable cost which may be awarded by the Court since there was a default in availing of the opportunity to the show-cause notice issued by the society and as suggested, Mr.Supehia has fairly consented showing the willingness to pay the cost of Rs.10,000/-(Rupees ten thousand only) to the

Society.

12. Since a party who has committed default in not availing of the opportunity cannot take undue benefit and with a view to see that dilatory tactics may not be encouraged, I am of the view that even if the order of the State Government and of the District Registrar are quashed on merits the petitioners must pay the cost of the Society of the litigation upto the stage of this petition and the society should not be financially burdened for the cost of the litigation. In view of the above, I find that the order passed by the District Registrar dated 8-4-1991 and the order passed by the State Government dated 3-12-1991 are illegal and deserve to be quashed and as a consequence thereof, the resolution dated 23-10-1990 under Section 36 of the Act will have to be quashed with a liberty to the society to undertake a fresh exercise of power under Section 36 of the Act, keeping in view the observations made earlier in this judgement and to take recourse to the law as permissible under the law.

13. In view of the above discussion, the resolution dated 23-2-1990 of the respondent Society, the order passed by the District Registrar dated 8-4-1991 and the order dated 3-12-1991 passed by the State Government arising from the order dated 8-4-1991 passed by the District Registrar are quashed and set aside and it is further directed that the society shall be at liberty to take the action against the petitioners, if permissible under Section 36 of the Act and the procedure as required under the law for such purpose shall be followed by the society.

14. The SCA No.174/1992 shall stand allowed to the aforesaid extent with the costs of Rs.10,000/- to be paid by the petitioners to respondent No.1 society, and the petitioner shall make of cost of Rs.10,000/- within a period of two months from today to the society. Rule is made absolute accordingly.

15. Since the question of expulsion of the membership is yet to be decided afresh by the society in light of the discussion and the directions given in SCA No.174/1992, the matter will have to be examined so far as the SCA No.173/1992 is concerned. It is true that Section 24 of the Act is declared ultra virus and as a result thereof the principles of open membership is not approved or is maintained by this Court. However, in view the decision of this Court reported in 1995(1) GLR, 19 and 1997(1)GLR, 602 (supra) it is settled legal

position that Rule 12(2) of the Rules cannot be ignored by the Society when the matter is considered for the purpose of granting admission to a member. Rule 12(2) of the Rules reads as under:

> "(2) No co-operative housing society shall without sufficient cause, refuse admission to its membership to any person, duly qualified therefor, under the provisions of the Act, and its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house and no such society shall without sufficient cause, refuse to give permission to any existing member thereof sell or transfer his plot of land or house to another person who is duly qualified as aforesaid to become its member."

16. On true construction of the aforesaid Rule, it appears that the society cannot refuse the admission to the membership without sufficient cause more particularly when the person is duly qualified and the existing bye-laws of the society enables the original member to transfer the plot or flat or tenement. However, when the District Registrar passed the order dated 4-2-1989, he has considered the provisions of Section 24 as well as Rule 12(2) of the Rules, but in substance the basis of the order is Section 24 of the Act. When the said Section 24 is not on the statute book, the District Registrar could not have ordered for admitting the petitioners as a member. At the most the District Registrar could have examined the aspect as to whether the Society has any justification for refusing the membership and whether the petitioners have such qualification to be admitted as members and whether the existing bye-laws of the society enables the original member to transfer the plot or not. The aforesaid aspects are not considered more particularly because the District Registrar has passed the order on the basis of the provisions of Section 24 of the Act. In my view, therefore, the Additional Registrar in appeal as well as the State Government exercising revisional power have rightly set aside the order of the District Registrar on the ground that Section 24 is declared ultra virus. But at the same time, since the matter is not considered by the District Registrar keeping in view the provisions of rules 12(2) of the Rules and it appears that even the society has not considered the said aspect keeping in view the Rule 12(2) of the Rules, I find that it was just and proper on the part of Additional Registrar and State Government to remand the matter by directing the society

for reconsidering the application of the petitioners to be admitted as a members keeping in view Rule 12(2) of the Rules and the observations made in this judgement earlier. Since both the lower authorities have committed jurisdictional errors to that extent, I find it proper to give such direction to society to reconsider the application of petitioner.

17. However, it is made clear that if the Society takes decision to undertake the proceedings under Section 36 of the Act against the original members, possibly the question may not arise for transferring such membership by admitting the petitioner as the member and, therefore, it is left to the society to take appropriate decision in accordance with law.

18. In view of the aforesaid, while upholding the decision of the Additional Registrar dated 29-3-1989 and of the State Government dated 3-12-1991, it is further directed that the society shall consider the application of the petitioner as per the observations made in this judgement earlier and shall take appropriate decision keeping in view the provisions of Rule 12(2) of the Act.

19. Special Civil Application No.173/1992 shall stand dismissed subject to the aforesaid directions. Rule is discharged. There shall be no order as to costs.

1-8-2002 (Jayant Patel, J.)

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